No. 14533

In The United States Court of Appeals

For the Ninth Circuit

RUTH B. KERRY,

Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy of Harold Edwin Kerry and the Community of Harold Edwin Kerry and Ruth B. Kerry, his wife, Bankrupt.

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLANT

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BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court, which is not reported, is included in the record herein (R. 48-50).

JURISDICTION

This is an appeal from an order of the District Court which affirmed, on petition for review, findings of fact, conclusions of law and an order of the referee in bank-

ruptcy. The referee's findings of fact and conclusions of law appear at R. 29-37, the referee's order at R. 38-9, the the petition for review at R. 40-5, and the district court's order at R. 50-1. The referee in bankruptcy and the district court held that the assignment of a partnership interest as security for a loan, approximately nine months before bankruptcy, is not valid as against the assignor's trustee in bankruptcy. The proceeding was initiated by appellant assignee's petition filed in a pending bankruptcy proceeding in the bankruptcy court for the Western District of Washington, Southern Division (R. 3-11), and respondent's petition to the same bankruptcy court to determine the right, title and interest of appellant and respondent in and to the partnership interest in question (R. 12-14). Appellant filed a reply (R. 15-16).

The bankruptcy court's jurisdiction is based upon §2 of the Bankruptcy Act of June 22, 1938, 52 Stat. 840, 11 U.S.C. §11, as amended. The bankruptcy court entered its findings of fact, conclusions of law and order denying appellant's petition on June 11, 1954. As the findings of fact (finding III, R. 30-1) and the pleadings (R. 5) establish, the order appealed from involves substantially more than $500.00. On June 15, 1954, a petition for review by the United States District Court for the Western District of Washington, Southern Division, was filed by appellant pursuant to §39 of the Bankruptcy Act, 11 U.S.C. §67. On August 12, 1954 the District Court entered its order

affirming the findings of fact, conclusions of law and order of the bankruptcy court. The jurisdiction of this court rests on §24 and §25 of the Bankruptcy Act, 11 U.S.C. §47 and §48, pursuant to which appellant filed her notice of appeal and the bond on appeal on September 9, 1954.

QUESTION PRESENTED

Whether the assignment by bankrupt of his interest in a partnership of which he was a member, as security for a loan, nine months prior to the institution of the bankruptcy proceedings, is valid as against the trustee in bankruptcy, under the applicable law of the State of Washington and the provisions of the Bankruptcy Act.

STATEMENT OF THE CASE

This case relates to the assignment by a partner of his partnership interest as security for a loan. The substantial question at issue is whether, under the law of the State of Washington as applied pursuant to the Bankruptcy Act, the assignment of the partnership interest is valid as against the trustee in bankruptcy of the assignor.

The present bankrupt* and three other individuals (not parties to this proceeding) were the partners. The assignment by the bankrupt of his interest in the partnership was made pursuant to R.C.W. §25.04.270, Uniform Partnership Act §27. The partnership itself made no assign-

*Harold E. Kerry, together with the community, was adjudicated a bankrupt. Ruth B. Kerry, in her separate capacity, is solvent and did not petition individually for bankruptcy, and she was not adjudicated a bankrupt.

ment. The partnership is solvent. Appellant is the assignee of the partnership interest. Respondent is the trustee in bankruptcy of the assignor-partner.

The assignor was adjudicated a bankrupt on October 2, 1953, upon his voluntary petition filed on the same day. The assignment of the partnership interest was made on the day the partnership was formed, December 30, 1952. This was a little more than nine months prior to the filing by the assignor of his bankruptcy petition. Prior to December 30, 1952, the business had been conducted as a corporation, and since July 28, 1952, bankrupt's shares of stock had been pledged to appellant. The sequence of significant events is as follows:

In 1949, West Tenino Lumber Co. was incorporated, and bankrupt acquired approximately 51% of the issued shares of stock. Thereafter, bankrupt pledged his shares of stock to Seattle-First National Bank to secure a loan. In July, 1952, the bank insisted on payment. Appellant had separate funds of her own, which she had inherited from her former husband; and on July 28, 1952, she loaned $29,250.00 from her separate property to bankrupt. Bankrupt pledged his West Tenino shares to appellant (and also his shares in Olympic Stud Mill, Inc., which latter are not in issue in this proceeding). Petitioner's Exhibit No. 2 (R. 71) is the promissory note to evidence the $29,250.00 loan; Petitioner's Exhibit No. 3 (R. 73-75) is the pledge agreement.

In December, 1952, the shareholders of West Tenino Lumber Company sought to dissolve the corporation and conduct the business as a partnership. By written agreement of December 30, 1952 (Petitioner's Exhibit No. 4, R. 81-83), appellant permitted the pledged shares of stock to be voted in favor of dissolution, and by the terms of the written agreement the pledgor's (now bankrupt's) partnership interest in the resulting partnership was to be simultaneously assigned to appellant as security for the loan. The corporation was dissolved on the same day by filing the certified copy of the dissolution resolution with the Secretary of State of the State of Washington (Petitioner's Exhibit No. 5, R. 83-87). Simultaneously, the partnership came into existence (Petitioner's Exhibit No. 6, R. 87-94), and the corporate trustee in dissolution conveyed the assets to the partnership (Petitioner's Exhibit No. 7, R. 94-97). On the same day, December 30, 1952, bankrupt delivered the executed assignment of his partnership interest (Petitioner's Exhibit No. 9, R. 100) to appellant. The shares in Olympic Stud Mill, Inc., were released from the pledge. There were three other partners, and they all had actual knowledge of the former pledge of the shares of stock and of the assignment of the partnership interest. (R. 134-135; cf. finding of fact IX, R. 33, 35.) The partnership continued in existence until the assignor-partner's bankruptcy.

The assignment of the partnership interest was made

pursuant to the Washington statute (Uniform Partnership Act), R.C.W. §25.04.270 (§27 of the Uniform Act). The Act does not require any filing or any notice (in fact, it makes no provision for filing.) However, as pointed out, the other partners had notice of the assignment. Appellant of course did not have possession of partnership assets, inasmuch as no partner nor his assignee has any right to the possession of partnership assets. R.C.W. §§25.04.250 and 25.04.260 (§§25 and 26 of the Uniform Act). As pointed out above, appellant was the assignee of an individual partner's interest in the partnership. The partner's interest in the partnership is in the nature of an intangible asset, as distinguished from tangible property. See R.C.W. §§25.04.250 and 25.04.260 (§§25 and 26 of the Uniform Act.)

The assignment was not filed or recorded.

Bankrupt was the manager for the partnership.

It may be noted that appellant from time to time loaned substantial additional sums to bankrupt, without any security, and that at the date of bankruptcy the sums owing on unsecured loans totaled $42,066.87. (R. 16-21,126.)

In this proceeding, the Referee in Bankruptcy held that the assignment was not valid as against the trustee in bankruptcy, on the grounds that it was not perfected because assignee was not placed in possession of any partnership property, and that an assignment of a part-

nership interest is an assignment of an account receivable, and not valid unless notice of account receivable financing is filed (Referee's Memorandum Decision, R. 22-28). On petition for review to the district court, the court affirmed the referee, but only on the ground that since the assignee of the individual partner did not exercise dominion or control over, or take possession of, any partnership assets, the assignment was not valid as against the trustee. (Memorandum Decision of District Court, R. 48-50).

For the convenience of this Honorable Court, there are set forth in the appendix to this brief the texts of the applicable provisions of §§60 and 70 of the Bankruptcy Act, and the applicable provisions of the Partnership Act and the Account Receivable Act.

SPECIFICATION OF ERRORS

The principal issue is a question of law, namely, did the referee and the district court err in holding the assignment invalid (specifications of error in findings of fact are primarly directed to reiterations of the conclusions of law appearing in the findings of fact.) Appellant makes the following specification of errors:

1. The district court erred in entering its order denying appellant's petition for review and affirming the Referee's findings of fact, conclusions of law and order of June 11, 1954, pursuant to the court's Memordandum Decision holding that the assignment of the partnership interest

by one of the individual partners is not valid as against that partner's trustee in bankruptcy.

2. The district court erred in failing to reverse the order and conclusions of the referee in bankruptcy as prayed in appellant's Petition for Review.

3. The referee in bankruptcy erred in entering the Order of June 11, 1954 adjudging that the appellant (assignee of the partnership interest) has no right, title or interest in the assignor's (bankrupt's) partnership interest and that the said partnership interest is an asset of the bankrupt estate.

3. The referee in bankruptcy erred in his conclusions that the assignment of the partnership interest is a pledge of an open book account and not effective as against the assignor's trustee in bankruptcy, and that giving effect to the said assignment would enable appellant to receive a greater percentage of her debt than some other creditor of the same class, and in his conclusion which appears in the findings of fact that appellant assignee exercised no dominion or control over any partnership interest of the assignor.

4. The referee in bankruptcy erred in his conclusion that the assigned partnership interest is an asset of the bankrupt and of the bankruptcy estate, and in refusing to grant appellant's petition to permit her to foreclose upon the said assignment or otherwise exercise her rights under the assignment as prayed for in her petition.

SUMMARY OF ARGUMENT

I.

The trustee in bankruptcy (respondent herein), by virtue of section 70a of the Bankruptcy Act (11 U.S.C. §110a), acquires whatever title to property the bankrupt may have had, and a transfer made by the bankrupt prior to bankruptcy is recognized unless some specific provision of the Bankruptcy Act avoids it. 4 *Collier on Bankruptcy* page 951; *Schultz v. England*, 106 F. 2d 764, 768. Rights to property are determined by state law (*Schultz v. England*, supra; 4 *Collier*, pages 1347-8), except to the extent that sections 60, 67 or 70 of the Bankruptcy Act may be applicable (11 U.S.C. §§96, 107 and 110). In this case, section 67 has no application.

II.

A. Section 60 invalidates certain transfers as "preferential" if made within four months before bankruptcy, and section 70 gives the trustee in bankruptcy all the rights of an execution creditor. To determine whether a transfer was made prior to or within the four months period, section 60a(1) and (2) state that a transfer by the bankrupt of personal property shall be deemed to have been made when it became so far perfected that no subsequent lien obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee (the "execution creditor"

test). Section 70c also employs the execution creditor test. Whether a transfer is effective against execution creditors is to be determined by state law. 3 *Collier* 913, 915; 4 *Collier* 1263. The assignment here was given more than four months before bankruptcy; and if under Washington law the assignment was valid against execution creditors when it was given, it is valid as against the trustee.

B. The transfer here was an assignment to appellant by a partner (the bankrupt) *of his interest in* a partnership. Under Washington law such an interest is personal property (R.C.W. §25.04.260, Uniform Partnership Act §26; *Davis v. Alexander*, 25 Wn. 2d 458, 171 P. 2d 167), and it is assignable (R.C.W. §25.04.270, Uniform Partnership Act §27). By the terms of the statute, the assignee is "entitled" to receive the assigning partner's share of the profits and, upon dissolution, the assigning partner's interest in the partnership.

No partner has any right to possess partnership assets for his own purposes, but only as an agent of the partnership. The partner's interest in the partnership is simply his share of the profits and surplus. R.C.W. §§25.04.250 and .260, Uniform Partnership Act §§25 and 26. When the partner assigns this intangible personal property, the assignee acquires his right to receive his share of the profits and surplus.

C. Under Washington law, assignments of intangibles are effective as against execution creditors the moment the assignment is given, and the law does not require, or even make provision for filing or recording the same. *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128; *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; *Lloyd L. Hughes, Inc., v. Widders*, 187 Wash. 452, 60 P. 2d 243. The assignment is valid even if no notice of the assignment is given to the obligor. *Bellingham Bay Boom Co. v. Brisbois*, supra; *Cox v. Bateman*, 139 Wash. 135, 245 Pac. 928. It may be noted, however, that in this case notice of the assignment was given to the other partners.

D. There are three exceptions to the general rule that assignments of intangibles are effective as against execution creditors of the assignor:

1. Since 1947, accounts receivable have been subject to the filing requirements of the Washington Account Receivable Act, R.C.W. §§63.16.010 et seq. However, a partners interest in the partnership is not an account receivable (R.C.W. §63.16.010). A debtor-creditor relationship is necessary to the applicability of the statute. Paton's *Accountant's Handbook*, sections 6 and 7; 1 *American Jurisprudence*, "Accounts and Accounting", §§2-6, 16; *Chicago, Millwaukee & St. Paul Railway v. Frye & Co.*, 109 Wash. 68, 186 Pac. 668; *Goodwin v. Northwestern Mutual Life Insurance Co.* 196 Wash. 391, 83 P. 2d 231.

2. If, *by agreement* between the assignor and assignee, the assignor is permitted to collect the assigned sums *and* apply them for his (the assignor's) own purposes, then, as a matter of law, the assignor is deemed to have retained title or dominion to the property, and the assignment is deemed fraudulent in law. *Fales Co. v. Seiple Co.*, 171 Wash. 630, 19 P. 2d 118; *Benedict v. Ratner* 268 U.S. 353, 45 S. Ct. 566, 69 L. Ed. 991. However, in the case before us, there is no evidence whatever that any such agreement existed. To the contrary, the partnership act by its very terms "entitled the *assignee* to receive" the assigning partner's share of the profits and surplus of the partnership. The record and the findings leave no doubt that appellant assignee's properties were kept separate from bankrupt's. Neither the referee nor the district court was able to make any finding that bankrupt assignor was given the right to collect the assigned sums and use them for his own purposes. The referee's conclusions (affirmed by the district court) that title or dominion did not pass to appellant are in error.

3. Where an assignment is given of an intangible which is represented by an instrument, the endorsement and delivery of which is indispensable to transfer the property, the attempted assignment of the intangible will not be effective against execution creditors without endorsement and delivery of the indispensable instrument. Negotiable instruments, certificates for shares of stock,

and negotiable warehouse receipts are common examples of such instruments. Since no such instrument exists with respect to a partnership interest, such cases as *Kietz v. Gold Point Mines, Inc.*, 5 Wn. 2d 224, 105 P. 2d 71, and *Hastings v. Lincoln Trust Company*, 115 Wash. 492, 197 Pac. 627 (cited in opinions below), have no application to the case here on appeal.

The assignment to appellant was effective against bankrupt's (assignor's) execution creditors when given, which was more than four months before bankruptcy; and consequently it is valid as against the respondent trustee.

III.

The technical exceptions of section 60a(6) of the Bankruptcy Act do not affect the validity of the assignment here, for these reasons:

A. Section 60a(6) relates *only* to certain types of *equitable* assignments, whereas the assignment here in question is a legal, not an equitable assignment. R.C.W, §§25.04.270, 4.04.020, 4.08.010, 4.08.080; 4 Pomeroy's *Equity Jurisprudence* (Fifth Edition), pages 787-8, 790-1.

B. Section 60a(6) does not even affect all equitable assignments, buy only those where state law *requires* a written instrument of assignment, filing or recording, or the like, as a condition to validity against third persons. However, Washington law does not even require that the assignment be in writing (*Horchover v. Pacific Marine*

Supply Co., 171 Wash. 330, 17 P. 2d 915), nor is notice to the obligor necessary (*Bellingham Bay Boom Co. v. Brisbois*, supra; *Cox v. Bateman*, supra). Nevertheless, in the case at bar, there was a signed and delivered assignment, and actual notice was given to the other partners. There was no violation of any provision of section 60a(6).

C. If it should be contended that a partner's interest in the partnership is only an equitable interest, then the technical provisions of section 60a(6) will have no application in view of the *proviso* in the last sentence, which reads: "Provided, however, That where the debtor's [i. e., bankrupt's] own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character." See also *Mulhern v. Albin*, 163 F. 2d 41, 43; *In re Estes*, 105 F. Supp. 761. 766.

Section 60a(6) does not affect the assignment here in question. The controling provisions of the Bankruptcy Act are sections 60a(1) and (2) and 70c, which recognize the validity of a transfer (e. g., an assignment) which is valid under state law as against execution creditors of the assignor. Since the assignment to appellant in the present case is valid against execution creditors under the law of Washington, it is valid against the respondent trustee.

IV.

There is no question that the debt secured by the assignment of bankrupt's interest in the partnership

greatly exceeds the value of the partnership interest, and the respondent trustee should be directed to abandon any claim to the partnership interest, since it has no value to the estate. 4 *Collier*, pp. 1216-8. The order of the district court should be reversed and the case remanded for entry of an order granting the relief prayed for by appellant.

ARGUMENT

I

Transfers (Including Assignments) Are Valid As Against Trustee In Bankruptcy Except As Provided In §§60, 67 And 70 Of The Bankruptcy Act

The problem before this court is whether the referee in bankruptcy and the district court erred in holding that the assignment by a partner, of his partnership interest, is invalid as against the trustee in bankruptcy of the partner.

It is axiomatic that a trustee in bankruptcy takes only such title to property as the bankrupt may have had at the date that the bankruptcy petition was filed. Transfers made by the bankrupt prior to bankruptcy are effective as against the trustee, in the absence of the applicability of specific exceptions in the Bankruptcy Act iself. See 4 *Collier on Bankruptcy* (14th Edition), page 951:

> "Accordingly, the general rule and the exceptions have been summarized in this fashion:

'Under section 70(a), the trustee is vested with the title of the bankrupt to all of his possessions and choses in action at the date petition is filed, except that exempt to him under the laws of the state.

'The trustee takes such property not as an innocent purchaser, but subject to all valid claims, liens and equities enforceable against the bankrupt, except in cases where there has been a conveyance or encumbrance which is void or voidable as to the trustee by some positive provision of the Bankruptcy Act." [citing *Matter of Toms* (CCA-6), 101 F. 2d 617, and other decisions.]

This court has expressed the rule in *Schultz v. England* (CCA-9), 106 F. 2d 764, 768, as follows:

"Turning then, to the appeal on its merits, we examine the California law as to the ownership of the equipment in question. *It is elemental that the trustee stands in the shoes of the bankrupt (except as against fraudulent conveyances and similar transactions, which are not here involved) and can assert no greater rights against the landlord than could have been asserted by the bankrupt in the absence of the bankruptcy proceedings.* If, then, under the California law the bankrupt had the right to remove the equipment in question, it follows that the decision of the district court confirming title in the trustee in bankruptcy should be affirmed."
[italics supplied]

Section 70 of the Bankruptcy Act (11 U. S. C., §110) provides:

"§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the

> petition * * * initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * * (5) property including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * "

Accordingly, it has consistently been held that, except for specific exceptions provided in the Bankruptcy Act, state law is determinative of the rights of the trustee and claimants and other parties. *Schultz v. England*, supra. In 4 *Collier*, pages 1347-8, the authors state, with numerous citations:

> "It is without dispute that the actual *existence and effect of all* liens, *claims and equities*, as distinguished from validity or invalidity under the provisions of the Bankruptcy Act, *is a matter to be determined by the appropriate state law*, as expounded by the decisions of the state courts. If anything was needed to settle this proposition, *Erie Railroad Company v. Tompkins* has done so. Of course, in the unusual case where a federal statute is invoked as the basis for a lien or claim, that statute as interpreted by the federal courts will control. It should be noted that in the absence of decisions by the highest court of a state, decisions of intermediate or lower courts will govern as to the interpretation of state law." [italics supplied]

In the case at bar, the transfer in question is an assignment of an interest in a partnership which operated a mill at Tenino, Washington (findings of fact VIII and IX, R. 32-35). The assignment was executed on December 30,

1952, "simultaneously with" the creation of the partnership. Finding of fact IX, R. 33. The statutes of the State of Washington expressly recognize assignments of partnership interests by a partner, and expressly provide that the assignment "entitles the assignee to receive in accordance with the contract the profits to which the assigning partner would otherwise be entitled" *and* in the event of dissolution "to receive his assignor's interest." The assignee may require an account from the date of the last account agreed to by all the partners. R. C. W. §25.04.270, Uniform Partnership Act, §27.

Consequently, under the rules referred to above, the respondent trustee can assert no title or right to the partnership interest in derogation of the rights of the appellant assignee, unless some provision of the Bankruptcy Act specifically avoids the effect of the assignment. The provisions of the Bankruptcy Act which can be invoked to test the effectiveness of a transfer are section 60 (11 U.S.C., §96), section 67 (11 U.S.C., §107) and section 70 (11 U.S.C., §110). Sections 60 and 70 will be discussed in succeeding sections of this brief.

There has been no suggestion by the respondent, either in the district court or before the referee, that there is any basis for considering section 67. Section 67a invalidates liens obtained by attachment, levy and the like, within four months before bankruptcy. Sections 67b and 67c relate to liens of employees, mechanics, landlords,

states and subdivisions, and of the United States. Section 67d invalidates certain transfers without consideration or otherwise in fraud of creditors. The findings of fact in the case at bar establish that the assignment before us was supported by ample consideration, i.e., substitution for pledges of shares of corporate stock (finding of fact IX, R. 33-5), and that the pledges of the shares of stock had been given for a concurrent loan of $29,250.00, which were the separate funds of appellant (findings of fact IV and V, R. 31). These findings are in accord with the views expressed by the referee at the close of the trial (R. 141) and in his memorandum opinion (R. 23-4).

For these reasons, it appears that only sections 60 and 70 merit consideration herein.

II.

The Assignment Here is Not Invalidated by §§60a, (1) and (2) or 70c of the Bankruptcy Act

A. §§60a (1) and (2) and 70c Recognize as Valid Transfers Which, under Applicable State Law, Are Valid as against Execution Creditors of Assignor.

The provisions of the Bankruptcy Act under which a trustee may attempt to attack a transfer are sections 60 and 70 (11 U.S.C., §§96 and 110). Section 60 declares that certain types of transfers are preferences and may, under circumstances there outlined, be avoided in bankruptcy. Section 70c declares that the trustee has the rights

of an execution creditor. Section 70e declares that a transfer which under any federal or state law is fraudulent or voidable by any creditor of the bankrupt having a claim provable against the estate, shall be null and void as against the trustee. Section 70e may be disregarded in view of the fact that no fraudulent transfer is here involved, and there are no preference statutes in the State of Washington with respect to transfers by persons other than corporations.

The transfer here in question (the assignment of the partnership interest) "was executed and delivered" on December 30, 1952. Finding of fact IX (R. 33, 34). The bankruptcy proceeding was not commenced until October 2, 1953. Finding of fact I (R. 30). More than nine months elapsed between the making of the assignment and the commencement of the bankruptcy proceedings. Since more than four months elapsed (see section 60a(1): "transfer * * * made * * * while insolvent and within four months"), the assignment will be immune to attack under section 60a, unless the effectiveness of the transfer is impaired under subdivision (2) thereof.

Subdivision (2) of section 60a is the general provision fixing the time when a transfer shall "be deemed to have been made" for the purpose of ascertaining whether or not the trustee can successfully attack the transfer. Subdivision (2) establishes one test for real property and a different test for "other property." Regardless of the date

of the documents, "a transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee." With respect to property *other than realty*, the first sentence of subdivision (2) states:

> "(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."

Since the property which is the subject of the transfer in the case before us is a partner's interest in a partnership, and is personal property (R.C.W. §25.04.260, Uniform Partnership Act §26), the "execution creditor" test of the first sentence of paragraph (2) is applicable. Consequently, if the assignment of the partnership interest, under Washington law, is effective as against execution creditors of the assignor, it will be deemed to have been made at the time of its execution—namely December 30, 1952, which was considerably more than four months before bankruptcy—and it will not be subject to avoidance by a trustee. If the assignment was ineffective as against execution creditors of the assignor, then the assignment will be deemed to have been made immediately before

bankruptcy, and consequently within the four months period.

It should be noted here that section 70c also utilizes an "execution creditor" test: "The trustee, as to all property * * * upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

Consequently, the issue before us is whether, subsequent to the execution of the assignment of the partnership interest on December 30, 1952, a creditor of the assigning partner could have obtained a lien by legal or equitable proceedings superior to the rights of the appellant assignee. This issue is to be determined under the law of the State of Washington. See 3 *Collier* 913, 915, and 4 *Collier* 1263:

> "It is evident that, under §60a, the determination of when a transfer is perfected depends almost wholly on state law * * *." 3 *Collier* 913.
>
> "Any notions that such matters were determinable by a general federal equity jurisprudence, or that the question as to the necessity of notice to the debtor for the completion of a legal assignment was a matter of general law, have been effectively dissipated by the doctrine of *Erie Railroad Co. v. Tompkins*, which clearly established the complete applicability of state law in non-federal matters." 3 *Collier* 915.

> " * * * Therefore, the trustee's powers, in every case governed by this portion of §70c, are those which the state law would allow to a supposed creditor of the bankrupt who had, at the date of bankruptcy, completed the legal (or equitable) processes for perfection of a lien upon all the property * * *." 4 *Collier* 1263.

See also, *Schultz v. England* (CCA-9), *supra*.

In the succeeding sections of this brief the effectiveness of the assignment here in question as against execution creditors, under Washington law, is discussed.

B. A Partner's Interest in the Partnership Is Intangible Personal Property under the Uniform Partnership Act, and Is Assignable.

The assignment with which we are concerned was *not* an assignment made by a partnership. Rather it is an assignment by a partner *of his interest in* the partnership. This partnership interest is personal property (R.C.W. §25.04.260, Uniform Partnership Act §26), and is assignable (R.C.W. §25.04.270, Uniform Partnership Act §27). Section 25.04.260 states:

> "*Nature of Partner's Interest in the Partnership.* A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."

The courts have consistently followed the rule that a partner's interest in the partnership is personal property, regardless of whether the partnership assets, as such, consist of realty, personalty, or both. *In Davis vs. Alexander*, 25 Wn. 2d 458, 171 P. 2d 167 (a suit for dissolution of

a partnership and accounting, commenced before the enactment of the Uniform Partnership Act), the court said:

> " 'Where land is purchased for sale and profit, it may, in equity, be regarded as personalty as among the partners'." 25 Wn. 2d 465.

and further:

> " * * * The land of the partnership is regarded in equity as personalty, and, when either partner handled it, either in purchasing or selling, he was not dealing in real estate for another, he was representing the partnership and disposing of a real estate asset of the partnership the same as if it were personal property." 25 Wn. 2d 458, 466.

R.C.W. §25.04.260, quoted above, has made the equitable rule of *Davis v. Alexander* a rule of law (although as will be observed hereinafter in Section III,C, of this brief, appellant's position is equally strong whether the partnership interest of the assigning partner be deemed a legal or an equitable interest). Decisions from many jurisdictions evidence the general application of the rule in dissolution and accounting suits, probate proceedings, execution proceedings, and the like. 7 *Uniform Laws Annotated*, pp. 153-9, and 1954 pocket supplement, pp. 57-61. Among other authorities is the decision in *LaRusso v. Paladino*, 109 N. Y. Supp. 2d 627, affirmed 280 App. Div. 988, 116 N. Y., Supp. 2d 617, where the court held that the interest in the partnership which passed upon the death of a partner was one in personal property, notwithstanding the fact that the partnership owned real property, and therefore the deceased partner's personal representative,

and *not* his heirs, was entitled to require an accounting. In *Claude v. Claude*, 191 Or. 308, 228 P. (2d) 776, 786, the court said:

> "Our conclusions above with reference to the disposition of the personal property in the manner indicated are based primarily upon the well known rule that partners do not, as individuals, own any specific part of the firm property. The interest of a partner in the firm assets is the share to which he is entitled after claims against the firm are satisfied and the equities and accounts, as between the partners, adjusted. Preston v. State Industrial Accident Commission, supra, 174 Or. at page 564, 149 P. 2d 957; First National Bank of Eugene v. Williams, supra, 142 Or. at page 660, 20 P. 2d 222; 68 C. J. S. Partnership, §85, page 525.
>
> "By §79-503, O.C.L.A., Uniform Partnership Law, the nature of a partner's interest is more succinctly defined as follows: 'A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.' Such a holding is by the partners in trust for the payment of the partnership debts. In re Pittock's Estate, 102 Or. 47, 52, 201 P. 428; 68 C.J.S., Partnership, §85, page 525. It applies to both real property and personalty. Adams v. Church, 42 Or. 270, 70 P. 1037, 59 L.R.A. 782, 95 Am. St. Rep. 740. When a partner is a co-owner with his partners of specific partnership property, he is said to hold it as a tenant in partnership, §79-502, O.C.L.A., Uniform Partnership Law, and the tenancy is known as a tenancy in partnership. Webber v. Rosenberg, 318 Mass. 768, 64 N. E. 2d 98."*

*The only decision of which we are aware that varies in any particular from the foregoing, subsequent to adoption of the Uniform Partnership Act, is the decision of an intermediate appellate court in New Jersey. *Hannold v. Hannold*, 4 N. J. Super. 381, 67 A. (2d) 352. That decision recognized the rule that generally a partner's interest in the partnership is personal property; but it held that upon the death of a partner, partnership realty descended to the heirs rather than to the personal representative. Even this limited exception to the rule seems to be contrary to the weight of authority. See 7 Uniform Laws Annotated, op. cit.

Not only does the partnership act specifically define the partner's interest to be personal property, but it expressly recognizes the assignability of that interest. Section 27 (R.C.W. §25.04.270) states that a conveyance or assignment does not dissolve the partnership, and that the assignee shall be "entitled" to receive the assigning partner's share of the profits, and, in the event of dissolution, to receive the assigning partner's interest. It reads:

> "Assignment of Partner's Interest. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.
>
> "(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners."

The uniform law commissioners' note to the section reads:

> "In re the subject of this paragraph [subd. 1] see [George, 153; Beale's Parsons, sections 106, 305, 306; Story, sections 272, 377, 308; Bates, sections 158-168, 931-933; Lindley, 397 et seq., 620; Jas. Parsons, section 175; Collyer, 151, 161; Kent, 59]. These authorities on the whole state that the mere assignment dissolves the partnership. Many such assignments, however, are merely by way of collateral security for

> a loan, the assigning partner in no wise intending to end the partnership relation. If he neglects his personal relation the other partners may dissolve the partnership under section 31 of this act. But the mere fact of assignment without more should not be said in all cases to be an act of dissolution. The change in the existing law follows a similar change of the English law embodied in section 31 of the English Partnership Act." [7 *Uniform Laws Annotated*, p. 160.]

The foregoing statutes make clear that the assignment by a partner, of his interest in the partnership, is an assignment of intangible personal property. It is personal property by express definition (R. C. W. §25.04.260). It is intangible by its very nature, in that the individual partner has no right to the possession of specific partnership assets for his own purposes, but only as an agent of the partnership as such (R.C.W. §25.04.250, Uniform Partnership Act §25), and his interest is his share of the profits and surplus (R.C.W. §25.04.260, Uniform Partnership Act §25). R.C.W. §25.04.250 provides:

> "Nature of a partner's right in specific partnership property. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.
>
> "(2) The incidents of this tenancy are such that:
>
> (a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property *for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.*

(b) *A partner's right in specific partnership property is not assignable* except in connection with the assignment of rights of all the partners in the same property.

(c) *A partner's right in specific partnership property is not subject to attachment or execution*, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) *On the death of a partner, his right in specific partnership property vests in the surviving partner or partners*, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, *has no right to possess the partnership property for any but a partnership purpose.*

(e) A partner's right in specific partnership property is not subject to dower, courtesy, or allowances to widows, heirs, or next of kin. [Italics supplied.]

The individual partner clearly has no right to assign or encumber partnership assets. However, he expressly has the right to assign "his interest in the partnership."

Under these statutes, once a partner has made an assignment *of his interest* in the partnership, there is nothing that his creditors can levy upon with respect thereto. Consequently, the assignment cannot be attacked under Section 70c of the Bankruptcy Act (11 U.S.C. §110c); and where the assignment was made more than four months before bankruptcy, as is the case here, it

cannot be attacked under Section 60a(1) and (2) of the Bankruptcy Act (11 U.S.C. §96a(1) and (2)).

There is no provision in the partnership act requiring any recording or filing of an assignment by a partner of his partnership interest. The courts of the State of Washington have always held (as pointed out in the following subdivision of this brief) that assignments of intangible personal property are effective as against execution creditors, without any filing or recording. Consequently, the assignment by bankrupt to appellant, which was executed and delivered on December 30, 1952, is not subject to attack by respondent trustee in bankruptcy.

C. Under Washington Law, Assignments of Intangible Personal Property Rights are Valid as Against Execution Creditors, with Only Three Exceptions.

The law of the State of Washington, throughout its history, has upheld the validity of assignments of intangible personal property interests. These assignments, whether absolute or for security purposes, have always been held to be effective as against the processes of creditors attempting to levy on the intangible property right. The Washington courts have stated, repeatedly, that the chattel mortgage filing statute and the bill of sale recording statute have no applicability where the property transferred is intangible property. The assignment, when executed, is "so far perfected that no subse-

quent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." Bankruptcy Act, Section 60a(2).

An early decision, which has been frequently cited by the Washington court, is *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128. In that case a water company made an assignment of one-half of its earnings, for security purposes. The assignment was not executed in the form of a chattel mortgage, and was not filed. Thereafter, a creditor of the assignor had a writ of garnishment levied, and the court was met with two questions: the first was whether the assignment was invalid because not in the form of a chattel mortgage and not filed; and the second was whether the specific earnings levied upon were among the one-half of the earnings referred to in the assignment. The court disposed of the questions in that order, and with respect to the first question held that the assignment of earnings need not be in the form of a chattel mortgage nor filed, for the reason "that [the chattel mortgage statute] refers to tangible property which may be taken into possession and not to intangible property, such as accounts and mere things in action which may not be taken into actual possession." Regarding the second question, the court held that the earnings levied upon were not a part of the one-half of the earnings which were assigned, and only on this latter ground held for the garnishment creditor. The court's

decision on the first question has frequently been cited with approval in Washington Supreme Court decisions. It resembles in many respects the problem before us, in that the assignment of the partnership interest, by express statutory provision, carries with it the right to receive the profits to which the assigning partner would otherwise be entitled, and upon dissolution to receive his assignor's interest.

In *Heermans v. Blakeslee* the court cited the earlier case of *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238, which also involved the assignment of intangible property. There, the court had considered the related question whether an absolute assignment (as distinguished from an assignment for security purposes) was valid even though not recorded as a bill of sale. The problems in the two cases were parallel, in that Washington statutes require mortgages of personal property to be filed, and bills of sale to be recorded, where the mortgagee or transferee does not take possession of the property. The court held that the bill of sale statute relates to tangible personal property, and has no applicability to assignments of intangibles. The court said:

> " * * * Our own statute provides (Gen. Stat., §1454), that no bill of sale for the transfer of personal property shall be valid as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the bill of sale be recorded in the auditor's office in the county in which the property is situated, within ten days after such

> sale shall be made. But that section evidently refers to tangible property which may be taken possession of by the buyer, and not to such property as accounts and judgments, mere things in action, which may be assigned but not delivered or possessed according to the common understanding of those terms. The legislature has simply said to buyers of personal property capable of being delivered, either take possession or record your bill of sale within ten days, or your property will be held subject to the claims of creditors and subsequent purchasers. But it has not yet said that no assignment of a chose in action shall be valid as to creditors or innocent purchasers unless recorded or notice thereof be otherwise given to such persons; and, in the absence of such a declaration, we do not think we ought to depart from what we deem the better doctrine, on account of any supposed analogy between ordinary bills of sale and assignments of choses in action." 14 Wash. 180-181; 44 Pac. 155.

In the *Bellingham Bay Boom Co.* case the court also had to decide whether or not giving notice of the assignment to the obligor is essential to validity of the assignment. The assignee in that case did not give notice to the obligor (the Boom Company) until *after* a creditor of the assignor obtained a writ of execution and had a writ of garnishment served on the Boom Company. The Boom Company instituted the interpleader action to ascertain whether the assignee or the execution creditor should prevail. As pointed out above, the assignment was held to be superior to the execution process, and the court held that this was so even though notice of the assignment was not given to the obligor. The court said:

" * * * It is true that the statute provides that debts and credits are subject to attachment and garnishment (Code Proc., §§300, 305, 306 and 523), but if the debt sought to be garnished is not, at the time, in fact due and owing from the garnishee to the attachment or judgment debtor, it necessarily follows that there is nothing upon which the writ can operate, unless it be true, as some courts have held, that an assignment is of no effect as to third persons until notice thereof is given to the garnishee. The garnisher can get no better right to the debt garnished than his debtor has, and if the latter has no right in or to the debt, the former acquires none by his garnishment.

We think an assignment of a chose in action in good faith and for value, and with no intent to hinder, delay or defraud creditors or subsequent purchasers, *is complete and effectual as against third persons, upon its execution and delivery to the assignee and does not acquire any additional force or validity by notice to the debtor.*" [Italics supplied] 14 Wash. 177, 44 Pac. 154.

A similar result was given in *Cox v. Bateman*, 139 Wash. 135, 245 Pac. 928, where the court followed the foregoing decision, stating:

"This case on principle is similar to that of *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238, where, after commencing an action to recover for money advanced and labor performed, and prior to judgment, an assignment of the account was made by the plaintiff to a creditor as collateral, the plaintiff continuing the litigation in his own name, as was the case in the present instance. In that case it was held, as against a writ of garnishment subsequently sued out and served, that notice to the debtor of an assignment of a chose in action, before the service of notice of garnishment upon him for a debt of the assignor, is not essential to the protection of the assignee." 139 Wash. 138-9, 245 Pac. 929.

Although an assignment is valid under Washington law, even without notice, it may be observed that in the case here on appeal there was actual notice to the other partners. Finding of fact IX (R. 35) and testimony of C. F. Stickney (R. 134-5).

In later decisions, the Washington Supreme Court has reaffirmed the rule of *Heermans v. Blakeslee* and of the *Bellingham Bay Boom Co.* case, and has clearly pointed out the distinction between assignments of intangible property and attempted transfers or encumbrances of tangible property. Where the subject of the assignment is crops, timber, a lessee's leasehold interest, and other such tangible property which can be taken into physical possession, the court has held the assignment invalid unless there is compliance with the chattel mortgage statute. However, in rendering such decisions, the court has pointed out that these cases must be distinguished from assignments of interests which are not susceptible of physical possession. One of the cases pointing out the distinction is *Lloyd L. Hughes, Inc. v. Widders*, 187 Wash. 452, 60 P. 2d 243, where the court held that an attempted assignment of tangible property, namely a crop of hops, was invalid for failure to comply with the statute relating to mortgages of crops, but said:

> " * * * If the assignment was of a chose in action, it was not necessary that it be executed and filed as a chattel mortgage, because the statute covering the manner of the execution and filing of chattel mort-

> gages refers to tangible property which may be taken into possession. *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128. Where there is an assignment of a lease of real estate, such assignment in order to shut off the rights of creditors, must be executed as a chattel mortgage, because a leasehold interest in real estate is a tangible interest that the assignee may take into his possession. *Farmers State Bank v. Scheel*, 124 Wash. 429, 214 Pac. 825; *First Nat. Bank of Lind v. Farm Loan & Inv. Co.*, 140 Wash. 410, 249 Pac. 983. That rule was applied in the case of *First Guaranty Bank v. Western Cross Arm & Mfg. Co.*, 139 Wash. 614, 247 Pac. 1027, where there was a contract for the sale of standing timber, which was treated as personal property, and the contract had been assigned as collateral security for a loan." 187 Wash. 455-6, 60 Pac. 2d 244.

Other cases involving tangibles susceptible of physical possession are *Farmers State Bank v. Scheel*, 124 Wash. 429, 214 Pac. 825 (leasehold); *Ackerson v. Babcock*, 132 Wash. 435, 232 Pac. 335 (wheat); *First Guaranty Bank v. Western Cross Arm & Mfg. Co.*, 139 Wash. 614, 247 Pac. 1027 (timber); *First Nat. Bank of Lind v. Farm Loan & Inv. Co.*, 140 Wash. 410, 249 Pac. 983 (leasehold); *Lloyd L. Hughes, Inc. v. Widders*, *supra* (crops).

The partner's interest in the partnership cannot be taken into physical possession. R.C.W. §§25.04.250 and .260, Uniform Partnership Act §§25 and 26. The rights of the partner and of his assignee are intangible, and like the intangibles referred to above, are assignable. R.C.W. §25.04.270, Uniform Partnership Act §27. In the case before us, a valid assignment was executed and delivered

to appellant, and since no subsequent lien by legal or equitable proceedings could become superior to appellant's rights, the assignment is valid as against the trustee in bankruptcy.

There are three exceptions to the general rule that an assignment of an intangible is valid when executed. Since the adoption of the Account Receivable Act in 1947, an assignment of an account receivable is not perfected as against execution creditors until the parties comply with the filing provisions of that Act. That is one of the exceptions to the rule governing intangibles in general. Another exception to the rule is that where the assignee, *by agreement* with the assignor, permits the assignor to collect or receive the proceeds of the assignment *and* use them for his (the assignor's) own purposes, the assignment will not be effective as against execution creditors. This latter exception was established in the case of *Fales Co. v. Seiple Co.*, 171 Wash. 630, 19 P. 2d 118. The third exception arises where the intangible is represented by an instrument which constitutes, in effect, a muniment of title, and endorsement and transfer of possession of the instrument is indispensable for the purpose of transferring the right to the intangible. The common examples of such indispensable instruments are negotiable instruments, certificates for shares of stock, and negotiable warehouse receipts. Where such indispensable instruments are involved, an assignment of the intangible is not perfected as against

creditors until the instrument is endorsed and delivered to the transferee.

It is appellant's position that none of these exceptions has any application to the assignment by a partner of his interest in the partnership. However, since these exceptions were urged by respondent before the referee and the district court, and the first two entered into the rationale of the referee's and district court's decisions, they are reviewed in the following subdivision of this brief.

D. The Three Exceptions to Validity of Assignments under Washington Law Are Not Applicable Here.

1. The statute governing assignments of accounts receivable was passed in 1947. Prior to its adoption, the Washington court had treated assignments of accounts receivable the same as assignments of any other intangibles. For example, in *Heermans v. Blakeslee*, supra, the court stated that the chattel mortgaged statute referred to tangible property, and "not to intangible property, *such as* accounts and mere things in action which may not be taken into actual possession." The court's statement in the *Bellingham Bay Boom Co.* case, supra, was, "but that section [referring to the bills of sale statute] evidently refers to tangible property which may be taken possession of by the buyer, and not to *such* property *as* accounts and judgments, mere things in action, which may be assigned but not delivered or possessed according

to the common understanding of those terms."

Accounts receivable are one species of intangibles, but since 1947 have been subject to separate treatment from other intangibles, by virtue of the Account Receivable Act. R.C.W. §63.16.010 et seq. The immediate question, therefore, is whether an assignment by a partner of his interest in a partnership is an assignment of an account receivable. If the assignment of a partnership interest is not an assignment of an account receivable (and it is appellant's position that it obviously is not), then the assignment is valid under the general rules relating to assignments of intangibles, without complying with the provisions of the Account Receivable Act.

The Act (R.C.W. §§63.16.010) defines account receivable as follows:

> "(1) 'Account' or 'account receivable' means an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note, draft, acceptance, or other similar instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts."

To be classed as an "account receivable" under this definition, an intangible must be "an open book account, mutual account, or account stated." Even if the chose in action does fall within the meaning of one of those terms, it will still be excluded from the definition of account receivable

if it should also be represented by a judgment, note, draft, acceptance or other similar instrument for the payment of money.

A partner's interest in a partnership is certainly not "an open book account, mutual account, or account stated." These terms have a well understood meaning, both commercially and at law. The terms open book account, mutual account and account stated signify the existence of a debt, as distinguished from an investment in a business. The recognition of this distinction in commercial and accounting practice is evident in the manner in which the classification of assets is discussed in a standard and well recognized accounting treatise, the *Accountant's Handbook*, by W. A. Paton. Receivables are discussed in Section 6 of the Handbook. The Handbook does not resort to a list of definitions, but simply discusses the classification of assets, upon the apparent premise that the terms are well understood in commercial and accounting practice. In Section 6, on receivables, there is a discussion of accounts receivable, notes and bills receivable and of various other types of receivables which do not normally come under the heading of account receivable. In Section 7 of the Handbook, there is a discussion of investments, in which are included investments in land, leaseholds, insurance contracts, stocks, bonds, partnerships and the like. It is obvious from the arrangement of the material in the *Accountant's Handbook*, and from the context, that a part-

ner's interest in the partnership is understood to be anything but a receivable, in general, or account receivable, in particular.

There is an equally well recognized distinction at law between an open book account, a mutual account, or account stated, as signifying a debt, on the one hand, and other types of intangible personal property on the other hand. In the article entitled, "Accounts and Accounting," in Volume 1 of *American Jurisprudence*, the terms, book account, mutual account and account stated, are discussed. A definition of the word "account" appears in Section 2 and reads as follows:

> "The term 'account,' in its broadest sense, means an unsettled claim or demand based upon a transaction *creating a debtor and creditor relation* between the parties thereto, usually but not necessarily represented by an ex parte record kept by one or both of the parties, but not evidenced by any written obligation." [italics supplied]

Book account is defined in Section 6 as follows:

> "§6. *Book Accounts.*—A book account may be defined, generally, as an account based upon transactions *creating a debtor and creditor relation*, evidenced by entries made in a book regularly kept and used for that purpose. A book account is a chose in action, and is property. Book account as a form of action, on an account, is considered in a subsequent section." [italics supplied]

The material in Sections 2 to 6 of the article in *American Jurisprudence* clearly indicate that the terms account re-

ceivable, book account and mutual account do not include all types of choses in action or intangible property rights. In fact, it is clear from these definitions that the law understands these terms in the same sense in which they are generally understood in the commercial and accounting world. Likewise, the definition of account stated, in Section 16 of the above-mentioned article, clearly shows that the term has reference to ordinary debtor-creditor relationships and not to intangible property rights, generally. The definition of account stated in Section 16 is as follows:

> "§16. *Generally; Definition, Nature, and Incidents.*— An account stated may be defined, broadly, as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. The amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular constituent items; *it is a liquidated debt*, as binding as if evidenced by a note, bill or bond. * * * " [italics supplied].

The Courts also recognize the fact that there are rights or choses in action which are not accounts receivable. For example, the Washington Supreme Court has held that sums owing by a shipper to a railroad for unpaid freight charges do not constitute a "mutual, open and current account." The question before the court involved the application of the Statute of Limitations, and in the case of a "mutual, open and current account" the Statute

begins to run from the date of the last item in the account. However, the court held that there was no "account," in that there was no intention to extend credit, and that the claim was simply on "a contract or liability, express or implied, not in writing," and that thus the Statute of Limitations ran on each item from the date of each shipment. *Chicago, Milwaukee & St. Paul Railway Company v. Frye & Co.*, 109 Wash. 68, 186 Pac. 668. In another case, the Washington Supreme Court considered the meaning of the term "account stated." In *Goodwin v. Northwestern Mutual Life Insurance Co.*, 196 Wash. 391, 83 P. 2d 231, the rights of the parties under a life insurance policy were in dispute, and the appellant contended that the dispute had been resolved by the establishment of an account stated, because appellant had rendered accounts to the insured and he had executed new documents and new loan agreements on the basis of such statements rendered. However, the court refused to hold that sums due or rights accruing under an insurance policy could become the subject of an account or of an account stated; and the court deemed the matter so clear that it simply stated:

> "In connection with this portion of appellant's argument, it is sufficient to say that we deem the well known principles of law governing accounts stated inapplicable to such a situation as is presented by this case." 196 Wash. 410, 83 P. 2d 240.

If the rights or choses in action considered in the two

above-mentioned cases were not accounts, or accounts stated, then *a fortiori* the interest of a partner in the partnership is certainly not an account, open book account, mutual account, or account stated.

Analagous decisions have been given by courts in other jurisdictions when they have had to ascertain what constitutes an account receivable. One illustration is the decision in *Black-Clawson Co. v. Evatt*, 139 Ohio St. 100, 38 N. E. (2d) 403, decided in 1941. In that case, the court was considering the applicability of a tax which was levied on "credits," which were defined in the statute as "the excess of the sum of all current accounts receivable and prepaid items . . . over and above the sum of current accounts payable of the business . . . " The court held that the advance payment of all or a portion of the purchase price of goods, when the order is placed, does not give rise to an account payable, as regards the seller, nor an account receivable, as regards the purchaser. Under the same statute, the Ohio Court held in *Chillicothe Paper Co. v. Glander*, 82 N. E. (2d) 413 (decided in 1948) that sums which an employer withholds from employees' wages, as withholding taxes, and which the employer is bound to pay to the United States, are not accounts payable.

The foregoing decisions, involving a variety of factual situations, illustrate the clear and consistent meaning the law gives to the terms, account receivable, book account, mutual account and account stated. There would seem to

be no question that a partner's interest in a partnership is not an account receivable, and an assignment by the partner of that interest is not an assignment of an account receivable and is not governed by the Act relating to assignments of accounts receivable. Consequently, the assignment of this intangible property right is governed by the general rule that the assignment is perfected as against third parties at the time the instrument of assignment is executed. Therefore, it is valid as against the trustee; and the referee's conclusion of law number II (R. 36) declaring the assignment to be "an incomplete pledge of an open book account" is erroneous and should be overruled.

2. Another exception to the general proposition that assignments of intangibles are valid when executed is the rule of *Fales Co. v. Seiple Co.*, supra. In that case it was held that where the assignee, *by agreement* with the assignor, permits the assignor to collect or receive the proceeds of the assignment *and* use them for his own purposes, the assignment will not be effective as against creditors. In the case before us there is no evidence whatever that any such agreement existed, and neither the court or referee made any finding that such an agreement existed. To the contrary, the partnership act expressly states that the assignment "entitles the *assignee* to receive" the profits and the assignor's interest in the partnership. R.C.W. §25.04.270, Uniform Partnership Act §27.

In *Fales Co. v. Seiple Co.*, the court made it abundantly clear that the decision was based upon the fact that there was an express written agreement whereby the assignee permitted assignor to collect the proceeds of the assignment and use them for his own purposes. The president and manager of the assignor was appointed as agent of the assignee to collect the assigned sums, and was authorized in writing to use the sums collected for assignor's own purposes until such time as assignee should demand that collections be turned over to assignee:

> "O. H. Seiple, president and manager of the two Seiple corporations, named as the third party in the agreement, was appointed as agent of the Fales company to
>
> " . . . collect all accounts receivable and to apply the proceeds as follows: Out of the first moneys collected third party (O. H. Seiple) shall first pay all accrued interest due. So long as there remain due and owing to second parties (the two Seiple corporations), accounts receivable which are not past due or uncollectible, and 10% in excess of all amounts due first party (the Fales company), and no demand has been made by first party for payment of amounts due, the proceeds collected by third party (O. H. Seiple) may be turned over to second parties (the two Seiple corporations) as their interest may appear and such amounts to be thereupon released from this assignment, provided, however, that all such amounts shall be used by second parties (the two Seiple corporations) in the business of said companies.'
>
> "The assignment agreement was properly executed by all parties." 171 Wash. 635, 19 P. 2d 120.

For eight months the assignee made no demand for the

sums collected. Finally, on December 2, 1930, the assignee made written demand that all collections be turned in to the assignee.

On the basis of the foregoing facts, the court concluded that the assignor did not surrender dominion and control of the subject of the assignment. In setting forth the basis for this rule that dominion and control is not surrendered where there is an agreement permitting assignor to collect and use the proceeds, the court said:

> "* * * The accounts receivable were required to be, at all times during the life of the loan, at least ten per cent in excess of the total amount due the respondent. The receivables were *not* to be collected by the respondent assignee. The receivables were to be collected by the president and manager of the two corporations, as agent of the respondent.
>
> "Under the facts as recited above, this was nothing more or less than a collection by the pledgor corporations. Respondent had the right to require—with this condition the defendant corporations complied—out of the moneys collected, payment of the interest accruing monthly on the loans. The contract also provided that, so long as the accounts receivable were ten per cent in excess of the amount due the respondent pledgee, the money collected by the corporations' president, respondent's agent, was to be turned over to the defendant corporations [the assignors] for use in the business of the two corporations if 'no demand has been made by first party (respondent assignee) for payment of amounts due;' that is, until required by the respondent to do so, the corporations were not required to apply any of the collections—other than the payment of monthly interest—to the repayment of respondent's loans to the defendant corporations. Other than stated above, there

was no provision requiring the corporations to account in any way to the respondent. * * *

"Until the representative of respondent took charge of the business of the corporations, the assignment was kept secret.Not until that time was notice of the pledge brought home to the debtors of the corporations; and not until that date was there an assertion of dominion by the respondent assignee over the subject matter of the pledge or assignment.

"On facts very little different from the facts in the case at bar, the United States supreme court held, in *Benedict v. Ratner*, 268 U.S. 353, that the arrangement was for the unfettered use by the borrower of the proceeds of the accounts, which precluded the effective creation of a lien and rendered the original assignment fraudulent *in law*." * * * [italics supplied] 171 Wash. 639-41, 19 P.2d 121-2.

As a basis for concluding that there is no surrender of dominion and control, the Washington court requires a finding of fact that there was an agreement permitting assignor to collect the assigned sums and use them for his own purposes. This is further illustrated by the comparison which the court made of the facts in *Fales Co. v. Seiple Co.* with those in *Benedict v. Ratner*, 268 U.S. 353, 45 S. Ct. 566, 69 L.Ed. 991. In the latter case, the assignor was permitted to collect the sums assigned and use them for his own purposes, until such time as assignee should demand otherwise. As a result the assignment was held to be fraudulent "in law" and void. The United States Supreme Court, to further emphasize that it was basing its decision on a rule of law, arriving at a legal conclusion based upon the facts recited above, stated that it was

using the terms "dominion" and "control" synonymously with the terms "title" and "ownership". The court said:

> " * * * A title to an account, good against creditors, may be transferred without notice to the debtor, or record of any kind. But it is not true that the rule stated above and invoked by the receiver is either based upon or delimited by the doctrine of ostensible ownership. It rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved. It does not raise a presumption of fraud. It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien." 268 U.S. 362-3, 69 L. Ed. 998-9.

The court said further:

> "* * * There must also be the same distinction as to degrees of dominion. Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies, the assignment must be deemed fraudulent *in law* if it is agreed that the assignor may use the proceeds as he sees fit.
>
> "In the case at bar, the arrangement for the unfettered use by the company of the proceeds of the accounts precluded the effective creation of a lien, and rendered the original assignment fraudulent *in law*. * * * " [italics supplied] 268 U.S. 364-5, 69 L. Ed. 999.

The Washington supreme court quoted the above portions of the opinion. In *Peterson v. National Discount Corporation*, 179 Wash. 108, 35 P. 2d 1097, the Washington Court reaffirmed the doctrine, and held that where an assignor of accounts receivable was permitted to receive and retain returned merchandise and credit the customers'

accounts therefor, the assignment was void as to third parties.

In the case now before us, there is no evidence, not even a suggestion, that there was any agreement which would have permitted the bankrupt (assignor) either to collect or use for his own purposes the profits which might have become distributable by the partnership, nor any agreement permitting assignor either to collect or use the proceeds of his interest in the partnership upon dissolution. In fact the partnership act provides that the assignee shall be entitled to receive the proceeds. The evidence shows that appellant's properties and funds were kept separate from those of bankrupt, and there was never any commingling of funds. R. 122. Even for such a simple question as whether, in the sale of appellant's securities which furnished the funds for the loan in question, the broker issued a receipt or statement regarding the securities, the bankrupt did not know the answer, and appellant had to volunteer with an answer to the question. R. 109-110. Neither the referee nor the district court was able to make any finding of fact that there was any agreement which would permit bankrupt (the assignor) to collect the proceeds of his interest in the partnership and apply them to his own purposes. In the absence of such findings, there is no foundation for the conclusion that appellant, the assignee, did not acquire dominion and control of the partnership interest. That

conclusion is synonymous with saying that no title or lien was created in assignee, and that the assignment is fraudulent and void *in law*. See *Benedict v. Ratner*, quoted supra. There is no foundation in the evidence, or in the findings, for this conclusion of the referee (affirmed by the district court in its memorandum decision, R. 48-50).

A conclusion of law which is not supported by evidence and findings of fact will be overruled; and the conclusion is not coverted into a "finding of fact" because the trial court so labels it, where it is in reality a conclusion of law. *Utter v. Eckerson*, CCA-9, 78 F. 2d 307.

> "In view of the findings with relation to the source of the moneys deposited by the clerk in the bank, the finding of the court, that these moneys were not public moneys, was a conclusion of law rather than one of fact, and depends upon the interpretation placed upon certain statutes of the United States and of the state of Idaho with relation to the deposit of public money in national banks which we will now consider." 78 F. 2d 308.

For a like ruling, see *Lambert Lumber Company v. Jones Engineering & Construction Co.*, CCA-8, 47 F. 2d 74, where the court said:

> "Appellees contend that this is a finding of fact. We think not. The trial court had made a number of specific findings of fact and drew its conclusion as to settlement from these findings. The court in effect states that from the findings of fact the conclusion follows that final settlement occurred prior to March 15, 1925. This seems to us to be clearly a conclusion of law. That a conclusion of law may be placed in the

> category of findings of fact does not change the character of the conclusion, and make it something that it is not. * * *" 47 F. 2d 77.

The conclusion in paragraph X of the findings of fact (R. 35) that "she exercised no dominion or control over any partnership property or any partnership interest of H. E. Kerry" is irrelevant in its reference to partnership property, and not established by any evidence or findings in its reference to the partnership interest, and should be disregarded. The referee and the district court erred in concluding that appellant exercised no dominion or control over the assigned partnership interest (referee, R. 26, 35), or that the partnership interest was not relinquished by bankrupt to appellant (district court, R. 49).

3. The third exception to the general rule that assignments are valid when made arises where the intangible is represented by some instrument, the endorsement and transfer of which is indispensable to the transfer of the intangible property. Common examples of such indispensable instruments are negotiable instruments, certificates for shares of stock, and negotiable warehouse receipts. The Washington courts have frequently held that attempted assignments of intangible property represented by such instruments are not valid as against creditors unless the necessary instrument is endorsed and delivered. *Kietz. vs. Gold Point Mines, Inc.*, 5 Wn. 2d 224, 105 P. 2d 71 (attempted pledge of shares of stock without endorse-

ment and delivery of certificates); *Hastings v. Lincoln Trust Company*, 115 Wash. 492, 197 Pac. 627 (attempted pledge of negotiable warehouse receipt without endorsement); *Qualley v. Snoqualmie Valley Bank*, 136 Wash. 42, 238 Pac. 915 (attempt by a pledgee in possession of a pledged negotiable promissory note and mortgage to repledge it without delivery to the second pledgee).

In the case before us, there is no such negotiable or indispensable instrument of title. There is nothing to take the case out of the usual rule that an assignment of intangible personal property is perfected as against third persons the moment the assignment is made. In fact, it is the law in the State of Washington that such an assignment is effective as against third persons even if it is oral, with no delivery of any written instrument. *Horchover v. Pacific Marine Supply Co.*, 171 Wash. 330, 17 P. 2d 915. The assignee's (appellant's) position in the case before us is even stronger than the position of the successful assignee in the *Horchover* case, because here there was a written assignment delivered to appellant (finding of fact IX, R. 33, 34). As mentioned in earlier portions of this brief, under Washington law, an assignment of intangible personal property is valid as against creditors and third parties even if no notice is given to the obligor. However, in the present case, the appellant's position is further fortified in that there was actual notice to the other

partners (R. 134-5; 35). The assignment was not kept secret.

Since the assignment, under applicable state law, was so far perfected on December 30, 1952, that no creditor could obtain superior rights by legal or equitable proceedings on a simple contract, it is valid as against the trustee, respondent herein, as far a §§60a(1) and (2) and 70c are concerned. The only remaining question is whether any of the technical exceptions of §60a(6) have any effect on the assignment before us.

III.

The Assignment is not Affected by the Provisions of §§60a (6) of the Bankrptcy Act.

A. §60a (6) Relates to Certain Types of Equitable Assignments, Wheras the Assignment Here is a Legal Assignment.

Section 60a (6) of the Bankruptcy Act (11 U.S.C., §96a (6)) provides that *equitable* liens will not be deemed perfected if applicable state law "*requires* a signed and delivered writing, or a delivery of possession, or a filing or recording, or other like overt action" as a condition to validity against third persons other than buyers in the ordinary course of business, and if such required steps have not been taken. This subparagraph was aimed at the attempted use of equitable liens "where available means of perfecting legal liens have not been employed."

Under the decisions of some states, even if the state law required a filing or recording of a bill of sale, or delivery of an indispensable or negotiable instrument as a condition to creation of a legal lien, the courts held that the mere promise to create a legal lien, or the execution of but failure to file the chattel mortgage or bill of sale, created an equitable lien, valid against creditors. Section 60a (6) is designed to strike down such equitable liens where "available means of perfecting legal liens have not been employed."

At the outset, it will be seen that section 60a (6) has no application where, under state law, the transfer or assignment is a *legal* assignment and not an equitable assignment.

The assignment by a partner of his partnership interest is a legal assignment. At one time, an assignment of a chose in action was not recognized in law, but only in equity; and assignments of intangible property were properly denominated "equitable" assignments, and the assignee acquired an equitable ownership. 4 Pomeroy's *Equity Jurisprudence* (Fifth Edition), pp. 787-8, §§1270-1. However, statutes permitting assignees to sue in their own name and combining legal and equitable procedures into one form of action have converted such assignments into legal assignments. 4 Pomeroy, pp. 790-1, §1274:

> "§1274. —Interpretation of This Legislation in the Reformed Procedure.—It is the settled interpretation

> of this provision in all the commonwealths where the reformed procedure prevails, that whenever a thing in action is assignable, the assignee thereof must sue upon it in his own name; and if the thing in action is itself legal, his right and interest under the assignment have been made legal. The provision itself does not render anything in action assignable; it does not affect in any way the quality of assignability; it simply acts upon things in action which are assignable, and if they are legal in their nature, and if the assignment is one which would have been recognized in a court of law by permitting the assignee to sue in the name of the assignor, then the interest of the assignee is legal."

The State of Washington has the "reformed procedure" spoken of by Pomeroy. R.C.W. §4.04.020 provides that "there shall be but one form of action * * *, to be known as a civil action." R.C.W. §§4.08.010 and 4.08.080 permit the assignee to sue in his own name. The partnership act expressly recognizes an assignment by a partner of his interest in the partnership. R.C.W. §25.04.270. There would seem to be no doubt that the assignment here in question is a legal assignment, and not an equitable assignment. Consequently, in bankruptcy, it is governed by section 60a (2) of the Bankruptcy Act, rather than 60a (6). Since the assignment is valid under state law against execution creditors, it is valid against the trustee under section 60a (2).

B. §60a (6) Is not Applicable because It Affects Only Those Equitable Assignments Where State Law Requires a Filing or Other Overt Act.

In addition to the foregoing considerations, it should be observed that section 60a (6) does *not* affect all equitable assignments, but *only* those where there is failure to comply with state law *requiring* a signed and delivered writing, filing or recording, or the like.

As has been pointed out above, Washington law does not require a written instrument of assignment, an oral assignment being valid against third persons. *Horchover v. Pacific Marine Supply Co.*, supra. Neither does Washington law require a notice as a condition to validity of an assignment. *Bellingham Bay Boom Co. v. Brisbois; Heermans v. Blakeslee; Cox. v. Bateman*, supra. Nevertheless, a written assignment was in fact executed and delivered in this case (finding of fact IX, R. 33, 34), and actual notice was given of the assignment (R. 134-5; finding of fact IX, R. 33, 35). Furthermore, not only does Washington law make no requirement that such an assignment be filed or recorded, it does not even provide any means for filing such an assignment. It is clear that the assignment to appellant does not violate any provision of section 60a (6).

C. If the Intangible Property Assigned Is an Equitable Interest, Then Under §60a (6) an Equitable Assignment is Valid Against the Trustee.

If it should be argued that a partner's interest in the partnership is only an equitable interest (which, would have been true *prior* to the adoption of the partnership act, *Davis v. Alexander*, supra,) then the technical pro-

visions of section 60a(6) will have no application. A provision in the last sentence of §60a(6) reads:

> "* * *: Provided, however, That where the debtor's [i.e., bankrupt's] own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character: * * *."

Mulhern v. Albin, CCA-8, 163 F. 2d 41, 43; *In re Estes*, 105 F. Supp. 761, 766.

As a result of the foregoing, it seems clear that the assignment of the partnership interest is not affected by section 60a(6). The controlling provisions of the Bankruptcy Act are sections 60a(2) and 70c, which recognize the validity of a transfer (e.g., an assignment), for security or otherwise, which is valid under state law as against creditors of the assignor.

IV.

Bankruptcy Law Provides for Abandonment by the Trustee of Claims to Property in Which the Estate has no Beneficial Interest

It is a well established principle of bankruptcy practice that the trustee should abandon claims to property which are of no value to the estate. This principle is not based upon any specific statutory provision; but it has been deemed self-evident and the courts have followed the practice of approving, and where necessary, requiring, abandonment of assets or claims which are of no value to the estate. 4 *Collier*, pp. 1216-8 expresses the rule as follows:

"* * * The fact that the property may possibly be burdensome does not prevent the title thereto from vesting in the trustee under §70a. And yet, the courts have always recognized that a trustee is under no duty to retain the title to a piece of property or a cause of action that is so heavily encumbered, or so costly in preserving or securing, that it does not promise any benefit to the funds available for distribution. Thus one of the main practical differences here is that in order to free himself of such property the trustee should actually and affirmatively disclaim in every case and cannot rely on the operation of any presumption in favor of disclaimer, as in the case of executory contracts or unexpired leases of real property. * * *

"* * * In the absence of any statutory provision it is therefore judge-made law to which we must look for an answer to the question whether or not a trustee may abandon and disclaim the title to property which by express provision of the law has been transferred to him. The answer is given by a long line of authorities and is too well established to require more than illustrative citation. It is clearly in the affirmative. The trustee (and in a proper case, the receiver before him) may abandon any property which is either worthless, or overburdened, or for any other reason certain not to yield any benefit to the general estate."

In this case, the court found that the value of the partnership interest in question is $22,000.00. Finding of fact III, R. 30-1. There is evidence of a disputed matter among the partners which could reduce the value of the partnership interest to $15,000.00 (R. 132), and for this reason appellant has asserted that the referee erred in finding the value to be $22,000.00 (Petition for Review, par. 2(a), R. 41; Statement of Points Upon Which Appellant Will Rely, par. 2(a), R. 155). In any event, the *maximum* value of the partnership interest is $22,000.00.

The loan which the assignment secures is in the sum of $29,250.00, all of which is a *bona fide* obligation. Finding of fact IV, R. 31. Since the assignment is valid as against creditors, the partnership interest can have no value to the trustee (respondent) and under the well established principle of bankruptcy practice, the trustee should be authorized and directed to abandon any claim thereto.

CONCLUSION

It is respectfully submitted that the assignment to appellant is valid, and the order of the district court should be reversed and the case remanded to the district court for entry of an order overruling the conclusions and the order of the referee, granting the relief prayed for by appellant, and directing the respondent trustee to abandon any claim to the partnership interest referred to herein.

Respectfully,

BOGLE, BOGLE & GATES
ARTHUR G. GRUNKE
For Appellant

APPENDIX A

BANKRUPTCY ACT

Sections 60a, 70a and 70c (11 U.S.C., §§960, 110a and 110c)

"**§60. Preferred Creditors.** a. (1) A preference is a transfer as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

(2) For the purposes of subdivisions a and b of this section, a transfer of property other than real property shall be deemed to have been made or suffered at the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee. A transfer of real property shall be deemed to have been made or suffered when it became so far perfected that no subsequent bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee. If any transfer of real property is not so perfected against a bona fide purchase, or if any transfer of other property is

not so perfected against such liens by legal or equitable proceedings prior to the filing of a petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of the petition.

(3) The provisions of paragraph (2) shall apply whether or not there are or were creditors who might have obtained such liens upon the property other than real property transferred and whether or not there are or were persons who might have become bona fide purchasers of such real property.

(4) A lien obtainable by legal or equitable proceedings upon a simple contract within the meaning of paragraph (2) is a lien arising in ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy. It does not include liens which under applicable law are given a special priority over other liens which are prior in time.

(5) A lien obtainable by legal or equitable proceedings could become superior to the rights of a transferee or a purchase could create rights superior to the rights of a transferee within the meaning of paragraph (2), if such consequences would follow only from the lien or purchase itself, or from such lien or purchase followed by any step wholly within the control of the respective lien holder or purchaser, with or without the aid of ministerial action

by public officials. Such a lien could not, however, become so superior and such a purchase could not create such superior rights for the purposes of paragraph (2) through any acts subsequent to the obtaining of such a lien or subsequent to such a purchase which require the agreement or concurrence of any third party or which require any further judicial action, or ruling.

(6) The recognition of equitable liens where available means of perfecting legal liens have not been employed is hereby declared to be contrary to the policy of this section. If a transfer is for security if (A) applicable law requires a signed and delivered writing or a delivery of possession, or a filing or recording, or other like overt action as a condition to its full validity against third persons other than a buyer in the ordinary course of trade claiming through or under the transferor and (B) such overt action has not been taken, and (C) such transfer results in the acquisition of only an equitable lien, then such transfer is not perfected within the meaning of paragraph (2). Notwithstanding the first sentence of paragraph (2), it shall not suffice to perfect a transfer which creates an equitable lien such as is described in the first sentence of paragraph (6), that it is made for a valuable consideration and that both parties intend to perfect it and that they take action sufficient to effect a transfer as against liens by legal or equitable proceedings on a simple contract: Provided, however, That where the

debtor's own interest is only equitable, he can perfect a transfer thereof by any means appropriate fully to transfer an interest of that character: And provided further, That nothing in paragraph (6) shall be construed to be contrary to the provisions of paragraph (7).

(7) Any provision in this subdivision a to the contrary notwithstanding if the applicable law requires a transfer of property other than real property for or on account of a new and contemporaneous consideration to be perfected by recording, delivery, or otherwise, in order that no lien described in paragraph (2) could become superior to the rights of the transferee therein, or if the applicable law requires a transfer of real property for such a consideration to be so perfected in order that no bona fide purchase from the debtor could create rights in such property superior to the rights of the transferee, the time of transfer shall be determined by the following rules:

I. Where (A) the applicable law specifies a stated period of time of not more than twenty-one days after the transfer within which recording, delivery, or some other act is required, and compliance therewith is had within such stated period of time; or where (B) the applicable law specifies no such stated period of time or where such stated period of time is more than twenty-one days, and compliance therewith is had within twenty-one days after the transfer, the transfer shall be deemed to be made or suffered at the time of the transfer.

II. Where compliance with the law applicable to the transfer is not had in accordance with the provisions of subparagraph I, the transfer shall be deemed to be made or suffered at the time of compliance therewith, and if such compliance is not had prior to the filing of the petition initiating a proceeding under this Act, such transfer shall be deemed to have been made or suffered immediately before the filing of such petition.

(8) If no such requirement of applicable law specified in paragraph (7) exists, a transfer wholly or in part, for or on account of a new and contemporaneous consideration shall, to the extent of such consideration and interest thereon and the other obligations of the transferor connected therewith, be deemed to be made or suffered at the time of the transfer. A transfer to secure a future loan, if such a loan is actually made, or a transfer which becomes security for a future loan, shall have the same effect as a transfer for or on account of a new and contemporaneous consideration."

"**§70. Title to Property.** a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to

his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, That in case the trustee, within thrity days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not

vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thrity days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the

assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

b. * * *

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and

other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such creditor actually exists."

APPENDIX B

UNIFORM PARTNERSHIP ACT

Section 25-27 (R.C.W. §25.04.250—25.04.270)

"25.04.250 Nature of a partner's right in specific partnership property. (1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this chapter and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is

not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner, his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

"25.04.260 Nature of partner's interest in the partnership. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

"25.04.270 Assignment of partners interest. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against

the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners."

APPENDIX C

ACCOUNT RECEIVABLE ACT

Section 1 (Definitions) (R.C.W. §63.16.010)

"63.16.010 Definitions. As used in this chapter:

(1) "Account" or "account receivable" means an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note, draft, acceptance, or other similar instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts.

(2) "Assignment" shall include any transfer, pledge, mortgage or sale of an account.

(3) "Creditor" means a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

(4) "Debt" means the indebtedness owing on an account.

(5) "Debtor" means any person by whom an account is owing to the assignor.

(6) "Filing officer" means the secretary of state."